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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-404

STATE OF INDIANA,
Petitioner,

vs.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, State of Indiana, respectfully prays this Court issue a Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), entered in cause numbers 74-1707 and 74-1708 on June 18, 1975.

OPINION BELOW

The opinion of the Seventh Circuit, which consolidated two district court cases, is not reported but may be found at pages A-1 through A-6 of the attached Appendix. The opinions of the district courts were issued by two

different courts of the United States District Court for the Southern District of Indiana, Indianapolis Division, and also are not reported at this time. The first case involved the Indiana School for the Blind and the Indiana School for the Deaf (hereafter Blind School Case). The second case involved fourteen (14) state hospitals (hereafter Hospital Case). Those two decisions may be found in the attached appendix pages A-7 through A-15 and A-16 through A-20 respectively.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1)(b) of the Rules of this Court to review a decision of the Seventh Circuit which has decided an important question of federal law which has not been, but should be, decided by this Court.

The decision of the Seventh Circuit was issued on June 18, 1975. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a suit under the Fair Labor Standards Act to secure coverage against the State of Indiana in the operation of its constitutionally provided deaf school, blind school and mental hospitals is barred by the Tenth Amendment to the Constituion of the United States?

2. Whether the State of Indiana in the operation of its constitutionality provided deaf school, blind school and mental hospitals constitutes an "enterprise engaged in

commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act?

3. Whether the attempted coverage under the Fair Labor Standards Act of the State of Indiana in the operation of its constitutionally provided deaf school, blind school and mental hospitals constitutes a denial of a Republican Form of Government as guaranteed by Article 4, § 4 of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 4, § 4 of the Constitution of the United States provides:

> The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence.

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

Article 9, § 1 of the 1851 Constitution of Indiana provides:

> It shall be the duty of the General Assembly to provide, by law, for the support of Institutions for the education of the Deaf and Dumb, and of the Blind; and also, for the treatment of the Insane.

29 U.S.C. § 202 provides:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States: (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic services in households affects commerce.
>
> (b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 203(h) provides:

> "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

29 U.S.C. § 203(i) provides:

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

29 U.S.C. § 203(s) provides in part:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—
>
> ...
>
> (4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); ...

29 U.S.C. § 207(a)(2) provides:

> No employer shall employ any of his employees who in any work-week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—
>
> (A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966.
>
> (B) for a workweek longer than forty-two hours during the second year from such date, or
>
> (C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 211(c) provides:

> Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

29 U.S.C. § 215 provides in part:

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—
> ...
>
> (2) to violate any of the provisions of section 206 or section 207 of this title, ...
>
> (5) to violate any of the provisions of section 211 (c) of this title....

I.C. 1971, 4-15-6-1 provides:

> "Any person employed by any agency or department of the state of Indiana the terms and conditions of whose employment is under the jurisdiction of the state personnel board or the department of administration and who is employed in the class ranges I through VII under the merit system or class ranges 8 to 32 under the nonmerit system as provided for in the Administration Act of 1961 [§§ 60-101—60-114] and the State Personnel Acts [§§ 60-1301—60-1348] and who is required to work overtime by the appointing authority of the state of Indiana or the agency or department of state government in which he is employed, from and after July 1, 1967, shall be paid for such overtime work at a rate of the amount of his regular base pay for such work, based upon the personnel records of such agency or department; ..."

STATEMENT OF THE CASE

The Secretary of Labor brought two suits against the State of Indiana to enjoin the State from allegedly violating sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, as found in 29 U.S.C. § 201 *et seq.* (hereafter the Act). Those sections prohibit violations of other sections of the Act—6, 7, 11(c) and 11(d)—which deal with minimum wages, maximum hours and record keeping. The suits also sought to restrain the State from withholding any overtime earnings which the Courts might find due to the various employees if they found coverage of the State in the operation of the schools and hospitals under the Act.

In the Blind school case the parties filed a joint stipulation of facts, and the District Court entered judgment for the Secretary of Labor. In the Hospital case the District Court entered summary judgment in favor of the Secretary of Labor after the decision was rendered in the Blind School case.

Facts Material To The Consideration Of The Questions Presented

I.

Blind School Case

The Blind School was founded by an act of the Indiana General Assembly in 1847, and has operated continuously

as the only such school in the State since that date. The statutorily defined purpose of the Blind School is to provide a residential and day school for the instruction, education and care of children who are deemed to be educable, but who cannot make satisfactory progress in the regular public schools of the state due to a serious visual deficiency. Another purpose of the Blind School is to provide training to meet the special needs of blind children that are imposed by visual impairment so that they may achieve their maximum ability for independence in travel, personal care and home management, and so that they achieve their maximum development of self-support through counseling, prevocational and vocational training. All activities performed at the Blind School are consistent with these purposes.

The Deaf School was founded by an Act of the General Assembly in 1844, and has operated continuously as the only such school in Indiana since that date, except for the school year 1918-1919 when the school served as a base for the United States Army. The statutorily defined purpose of the Deaf School is to provide a residential and day school for the instruction, education and care of children who are deemed to be educable but who cannot make satisfactory progress in the regular public schools of the state by reason of a serious hearing deficiency. Another purpose of the Deaf School is to provide training to meet the special needs of deaf children that are imposed by a hearing impairment so that they may achieve a high degree of ability to communicate by speech reading, writing and spoken language, and so that they achieve their maximum development toward self-support through counseling, prevocational and vocational training. All activities performed at the Deaf School are consistent with these purposes.

Neither the Blind School nor the Deaf School manufacture goods for sale in interstate commerce and do not ship goods in interstate commerce, except that the schools send various items through the mail such as checks, purchase orders and student records, and the Deaf School prepares certain instructional materials paid for by Title I federal funds which pursuant to federal law must be shipped from the Deaf School to any university that requests such material for use in teaching teachers to teach deaf children.

Money is received at the two schools from the sale of meals, rental of rooms and other items. Employees pay the nominal charge of $.50 per meal and visitors $1.00 per meal, with all money being deposited in the State General Fund and not constituting revenue to the schools. There is no charge for meals to counselors while they are on duty with the children.

The two schools provide living quarters for employees required to live at the schools, the nominal charge at the Deaf School being $4.62 bi-weekly plus $.92 bi-weekly for laundry services, and the nominal charge at the Blind School being $12.00 per month for both room and laundry. This money also goes into the State General Fund and does not constitute revenue for the schools.

II.

Hospital Case

This case was concerned with the operation of twelve (12) mental hospitals operated under the jurisdiction of Indiana's Mental Health Commissioner and two institutions operated under the jurisdiction of Indiana's Health Commissioner. Although involving all of these institutions, the case centered around the operation of Muscatatuck Hospital and Training Center (hereafter Muscatatuck).

No products are manufactured, handled or produced for resale at Muscatatuck, and the employees are not involved in any production of goods, handling, storing or working upon any goods for resale. The only products that are sold at Muscatatuck are at the Canteen, and any profits from those sales go directly into the institution's General Recreation Fund.

The first state mental hospital was authorized by an act of the Indiana General Assembly in 1845, and the remaining hospitals have been authorized by subsequent state statutes.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITS APPLICATION OF THE FAIR LABOR STANDARDS ACT TO THE STATE OF INDIANA IN THE OPERATION OF ITS CONSTITUTIONALLY PROVIDED BLIND SCHOOL, DEAF SCHOOL AND MENTAL HOSPITALS.

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or the people."

The attempt in this cause to compel a sovereign state to comply with wage and hour provisions of the Act as Congress fancies is plainly unconstitutional pursuant to the Tenth Amendment.

The State in the operation of its Blind School, Deaf School, and mental hospitals, is exercising the powers of education, internal fiscal policy, and general welfare, powers not delegated to the United States nor prohibited to the states by the Constitution. Those powers traditionally have been recognized as belonging to the states. *San Antonio School District v. Rodriguez,* 93 S.Ct. 1278 (1973), *Milliken v. Bradley*, 94 S.Ct. 3112 (1974).

Article 9, Sec. 1 of the 1851 Constitution of the State of Indiana provides:

> "It shall be the duty of the General Assembly to provide, by law, for the support of Institutions for the education of the Deaf and Dumb, and of the Blind; and also, for the treatment of the insane."

The guise of the control of interstate commerce certainly cannot operate to permit such an obvious intrusion into the constitutional powers of a sovereign state. An examination of the two schools and the mental hospitals clearly shows that they are not industries, businesses, trades or commercial establishments of any kind. The schools do not charge for the services they provide to the students, and the hospitals only charge for actual operating expenses. They have no "products" which they sell, and they have no sales of consequence, certainly none in the magnitude required of a business or industry to come within the purview of 29 U.S.C. § 203(s)(1).

The employees at the two schools and the hospitals are paid for any overtime worked on a straight time basis as mandated by IC 1971, 4-15-6-1, as quoted above. Neither the Department of Labor nor the District Courts sought to have this statute declared unconstitutional. In fact, they were not concerned with the statute at all. However, the

statute is a valid enactment by the Indiana General Assembly concerning the management of the fiscal policies of the State of Indiana, and cannot be lightly overridden.

This case, at this point in time, does not involve an accounting for the alleged payment violations. However, once coverage was determined, the fiscal impact upon the State became immeasurable. As Judge Northrop said in his dissent in *State of Maryland v. Wirtz,* (D.C. Md. 1967) 269 F. Supp. 826, 853:

> "By this Act Congress is forcing, under threat of civil liability and criminal penalties, the state legislature or the responsible political subdivision of the state
>
> 1. to increase taxes (an impossibility in some of the political subdivisions without a state constitutional amendment); or
>
> 2. to curtail the extent and calibre of services in the public hospitals and educational and related institutions of the state; or
>
> 3. to reduce indispensable services in other governmental activities to meet the budget of those activities favored by the United States Congress; or
>
> 4. to refrain from entering new fields of governmental activity necessitated by changing social conditions.
>
> *The allocation of the state's revenue among government activities is the most important function of state government, for it determines the extent and calibre of service which a state can supply. State governments must provide services out of current tax funds. The state government and its political subdivisions are particularly sensitive to the needs of the people and their ability to pay for the indispensable governmental functions that must be furnished.*" (Emphasis supplied.)

In Justice Douglas' dissenting opinion in *Maryland v. Wirtz,* 392 U.S. 183, 201 (1968) he correctly observed that:

> ". . . what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."

Justice Douglas further stated at pages 203 and 204:

> "There can be no doubt but that the 1966 amendments to the Fair Labor Standards Act disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education. Yet the Court considers it irrelevant that these federal regulations are to be enforced against sovereign States and limits its consideration to 'whether there is a rational basis for regarding them as regulations of commerce among the States.'
>
> ". . . It is one thing to force a State to purchase safety equipment for its railroad and another to force it to spend several million dollars on hospitals and schools or substantially reduce services in these areas. The commerce power cases the Court relies on are simply not apropos."

The State of Indiana would submit that in this case, the application of the Act to the State in the operation of its Blind School, Deaf School and mental hospitals is unconstitutional under the Tenth Amendment. Congress has significantly invaded the sovereignty of Indiana, and this invasion was merely a forewarning of things to come. In 1974, Congress passed further amendments to the Act. Those amendments, which are currently being challenged in this Court by Indiana and several other states, cities and organizations, further attempt to destroy the ability of the states and cities to manage their own internal affairs. *National League of Cities v. Dunlop,* No. 74-878, and

State of California v. Dunlop, No. 74-879. This Court must review that drastic invasion of sovereignty, and reverse it.

II.

THE STATE OF INDIANA IN THE OPERATION OF ITS CONSTITUTIONALLY PROVIDED BLIND SCHOOL, DEAF SCHOOL AND MENTAL HOSPITALS DOES NOT CONSTITUTE AN "ENTERPRISE ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE."

A.

The State Is Not An Industry

Initially, the State would assert that even if the two schools and the hospitals might be enterprises within the meaning of Sec. 3(r) of the Act, 29 U.S.C. § 203(r), they are not within the purview of the Act as established by the Congress of the United States. In Sec. 2 of the Act, entitled "Finding and Declaration of Policy," which is quoted above, Congress declared that the policy of the Act was to eliminate various detrimental conditions *"in industries engaged in commerce or in the production of goods for commerce."* 29 U.S.C. § 202(a). (Emphasis supplied.)

Thus, the first inquiry here is what constitutes an "industry," and Congress has defined that term in Sec. 3(h), 29 U.S.C. § 203(h), as "a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed." The terms "trade," "business," or "industry" are not further defined in the Act, but obviously those terms cannot be stretched to include a state in the operation of a one-of-a-kind school agency or unique eleemosynary institutions within that state. Therefore, the State would emphatically assert that it is not within the

congressional intent of those industries that are to be controlled by the Act.

B.

Coverage By The Act Must Satisfy One Of Three Tests

There is no checklist to determine whether there is coverage under the Act. Rather, each case must be examined on its own facts. In order to have coverage of the State in the operation of its Blind School, Deaf School, and mental hospitals, a Court must find, pursuant to Sec. 3(s)(4) that the State has employees: 1) engaged in commerce, or, 2) engaged in the production of goods for commerce, or, 3) who handle, sell or work on goods that have been moved in or produced for commerce by any person. Both number 2 and number 3 above are concerned with "goods," i.e., the "production of goods" (number 2) and "handle, sell or work on goods" (number 3). Thus, these two tests must be read in conjunction with the definition of "goods" found in Sec. 3(i) as follows:

> " 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but *does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.*" (Emphasis supplied.)

Therefore, if the State in the operation of its Blind School, Deaf School and mental hospitals is an "ultimate consumer," then the only way in which a Court could find coverage under the Act would be to find that the State has employees engaged in commerce, i.e., test number 1 above.

The stipulated facts in this case clearly show that the State is an ultimate consumer. The parties stipulated in the District Court that:

> "The two school institutions *do not manufacture goods for sale in interstate commerce* and, except as otherwise provided by the stipulation, *do not ship goods in interstate commerce.* (Emphasis supplied.)

Those exceptions include where the Deaf School is required by federal law to send a copy of any instructional material it develops using federal funds to any university that teaches teachers to teach deaf children upon request by the university, or where the schools send checks, purchase orders, transcripts or similar items, through the mails, assuming, *arguendo,* that those items constitute "goods" for purposes of the Act.

The District Court in the Blind School case appeared to ignore the plain reading of the statutory definition of the term "goods" in Sec. 3(i), saying that the "ultimate consumer" provision or rationale is immaterial to enterprise coverage under the Act, and found that the schools are not the ultimate consumers of foods, drugs and school supplies. Appendix page A-15.

In the Hospital case the District Court simply stated that the patients and not the hospitals were the ultimate consumers. A-19.

It is interesting to note that if the school institutions were restaurants they would be exempted under Sec. 3 (s)(1) of the Act since food sales for fiscal 1972 were approximately $7,500.00 for the Deaf School and $5,600.00 for the Blind School, or well below the $250,000.00 statutory exclusion.

In *Divins v. Hazetine Electronic Corp.,* (D.C.N.Y., 1946) 70 F. Supp. 686, rev. on other grounds 163 F.2d 100 (2d Cir. 1947), the Court indicated that the term "ultimate consumer" could not be limited only to goods which are fully completed, permanently installed, or consumed, but also must be construed to include the person who uses such goods, 70 F Supp. at 688.

There is no assertion by the Department of Labor or the District Courts, nor could there be, that the children serviced by the two school institutions pay for food, drugs or school supplies. In fact, the children pay nothing to attend either of the two schools since they are established pursuant to Indiana law for physically handicapped children.

In *Schultz v. Wilson Bldg. Inc.,* (D.C. Tex. 1970), 320 F. Supp. 664, that Court discussed the term "ultimate consumer" and the enterprise concept, and said in Conclusion of Law Number 5 at page 669:

> "Since February 1, 1967, defendant's janitors, maids, and maintenance employees have been engaged in the handling of materials that have been moved in or produced for commerce and would, therefore, be covered by 29 U.S.C. § 203(s)(5) if these materials were to constitute 'goods' as that term is defined in the Act 29 U.S.C. § 203(i). But these materials handled by janitors, maids, maintenance employees and mechanical engineers are not 'goods' under the definition in the Fair Labor Standards Act because such materials when handled and worked on by said employees are in the hands of the ultimate consumer."

Under the rationale followed by the lower Courts in this cause, the materials used in the *Schultz* case would apparently have been "goods" while in the hands of the Defend-

ant Corporation that purchased the items, but would have ceased to be "goods" when they were given to the employees for use. However, such a rational is untenable since the employees, who perform a function for the employer, do nothing to secure the delivery of the goods and can do nothing to use them or to perform their function for their employer unless the items are delivered. Thus, the holding in *Schultz* that the items do not constitute "goods" to the Defendant Corporation is the better holding.

The patients at the State hospitals at the time involved herein did pay a nominal amount for their care. That payment was determined by taking the total *operating* expenses divided by total patient days to get a per day amount which is multiplied by the number of days a particular patient received care.

In *Barbe v. Cummins Construction Co.*, (D.C. Md., 1943), 49 F. Supp. 168, a large Maryland construction company was held to be an ultimate consumer even though the complaining employee worked on building materials shipped from out-of-state and even though that employee had gone out of state to work at a site for the same contractor. The Court simply held that the plaintiff's work on the materials "clearly was of an entirely intrastate and local character." 49 F. Supp. at 171.

The tests for determination of what constitutes an ultimate consumer have been stated by several courts. In *Hamlet Ice Co. Inc. v. Fleming,* (4th Cir., 1942), 127 F. 2d 165, that Court said at pages 170 and 171:

> ". . . It seems clear that the exclusion clause [Sec. 3(i)] was intended to apply only to goods which, having come into hands of the ultimate consumer, have been withdrawn from further traffic and sale, so that interstate transportation of the goods may take place without responsibilities for a prior production in violation of the standards of the Act . . ."

The Second Circuit, in *Phillips v. State Overall Dry Cleaning Laundry Co.,* (2d Cir., 1945) 149 F.2d 416, 419, said:

> "The delivery contemplated by § 3(i) of the statute is, we think, one which gives the ultimate consumer the right to deal with the 'goods' as his own while they are being consumed . . ."

In *Powell v. United States Cartridge Co.,* 339 U.S. 497, 513, 70 S. Ct. 755, 764 (1950) this Court stated:

> ". . . The literal meaning of the exclusionary clause in § 3(i), and that which best serves the purpose of the Act, is merely that, after the products shall have been delivered into the actual physical possession of their ultimate consumer, they then shall cease to be 'goods'. This retains the important effect that, thereafter, it is not a violation of § 15(a)(1) for the ultimate consumer to transport the products outside of the state. This interpretation was adopted by the Wage and Hour Administrator. 1940 WH Man. 131, 133. It was readopted without change in the July, 1947, revision of the Administrator's Interpretations. 12 Fed. Reg. 4585, 29 C.F.R. § 766.7(h)."

The Third Circuit in *Stevens v. Welcome Wagon International, Inc.,* (3rd Cir., 1968) 390 F.2d 75, held that records, reports and service contracts which were required by Welcome Wagon to be shipped to various out-of-state locations were of no value on their own; that those items were not the company's business objective; and that the company did not sell them as goods. Therefore, the ultimate consumer exclusion prevailed.

The State would assert that if the "ultimate consumer" in *Hamlet Ice Co., supra,* could ship those goods in interstate commerce and still be classified as an ultimate consumer, the State must be the ultimate consumer here. The State would further assert that the definition of "goods"

must be read strictly; that the State in the operation of its Blind School, Deaf School and mental hospitals, is an ultimate consumer; and that therefore, there is no coverage of the State under the second and third tests of Sec. 3 (s)(4).

C.

The State Is Not Engaged In Commerce In The Operation Of Its Blind School, Deaf School And Mental Hospitals

The State would submit that in order for a Court to find coverage under the Act, it would have to be shown that the State comes within test number 1 above, i.e., that in the operation of its Blind School, Deaf School and mental hospitals, the State has employees "engaged in commerce." This, the Department of Labor failed to do.

In *Mitchell v. Vollmer & Co.*, 349 U.S. 427 (1955), a case arising under the same sections of the Act as the case at bar, Justice Douglas speaking for this Court, said at page 429:

> ". . . The question whether an employee is engaged 'in commerce' within the meaning of the present Act is determined by practical considerations, not by technical conceptions . . . *The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.*" See *McLeon v. Threlkeld*, 319 U.S. 491, 497. (Emphasis supplied.)

Using the above-quoted test, it hardly seems necessary to reiterate that this cause involves two schools; one, the only public state-supported school for visually handicapped children in Indiana; and the other, the only public, state-supported school for hearing handicapped children in Indiana; as well as State mental hospitals. The parties stipulated below that all activities of the two schools are consistent with the care, education, and training of these children. Thus, there is no "instrumentality or facility of interstate commerce" involved here. Likewise, the activities of the employees who are engaged in the care, education and training of visually and hearing handicapped children and the mental hospitals could hardly be classified as work "so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it."

Time and again this Court has stated that the scope of the Act is not coextensive with the constitutional power of Congress over commerce, *Kirschbaum Co. v. Walling*, 316 U.S. 517, 522 (1942); *10 East 40th Street Building, Inc. v. Callus*, 325 U.S. 578, 579 (1945), and that the enforcement of the Act "involve the courts in the empiric process of drawing lines from case to case, and inevitably nice lines." *10 East 40th Street Building, Inc. v. Callus*, supra, at 579.

In *Mitchell v. H. B. Zachry Co.*, 326 U.S. 310 (1960), this Court said at page 316:

> ". . . *For the Act also manifests the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character.* Accommodation of these interests was sought by the device of confinement of coverage to employment in activities of traditionally national concern. The focus of coverage became 'commerce,' not in the broadest constitutional sense, but in the limited sense of § 3(b) of the statute: 'trade, commerce, transportation, transmission, or communication among the several States' . . ." (Emphasis supplied.)

Accord: *Hayden v. Bowen*, (5th Cir., 1968) 404 F.2d 682, 683; *Wirtz v. B. B. Saxon Co.*, (5th Cir., 1966) 365 F. 2d 457.

In *Hodgson v. Hyatt Realty and Investment Co.,* (D.C. N.C. 1973) 353 F. Supp. 1363, the defendant Corporation sold license plates, made by prisoners, for the State of North Carolina. Relying on *Mitchell v. Zachry Co., supra,* the District Court found Hyatt Realty to be an independent contractor not covered by the Fair Labor Standards Act. *Hyatt* is closely related to the issues in the case at bar. See also *Razey v. Unified School District No. 385,* 205 Kan. 551, 470 P.2d 809 (1970); *Schultz v. National Electric* Co., (10th Cir. 1969) 414 F.2d 1225; *Schultz v. Ponsetto,* (D.C.W.D. Pa., 1970) 358 F. Supp. 329.

The activities complained of here are "of a dominantly local character." These activities are concerned not with the "functioning of an instrumentality or facility of interstate commerce" but with the operation of *the* public school for the education of blind children in Indiana, *the* public school for education of deaf children in Indiana and the State's mental hospitals.

The Act does not merely define an "enterprise engaged in commerce or in the production of goods for commerce" as one which has employees engaged in the operation of a school for the physically handicapped. Rather, Sec. 3(s) sets up a multiple requirement, i.e., must be an enterprise which meets one of the three tests above "*and* which is engaged in the operation of an institution primarily engaged in the care of . . . the mentally ill or defective who reside on the premises of such institution, [or] a school for . . . physically handicapped or gifted children . . ." Therefore, coverage is not automatic and is not present here. See *Mitchell v. H. B. Zachry Co., supra,* and *Hodgson v. Hyatt Realty and Investment Company, Inc., supra.*

III.

THE ATTEMPTED COVERAGE OF THE STATE OF INDIANA UNDER THE FAIR LABOR STANDARDS ACT CONTRAVENES ARTICLE 4, § 4 OF THE CONSTITUTION

Article 4, Section 4 of the United States Constitution states:

> "The United States shall guaranty to every state of this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence."

Throughout these lawsuits, the Department of Labor claimed that this Article of the Constitution has generally been treated as not applicable to judicial enforcement. The State of Indiana generally agrees with that construction. Here, Indiana does not seek judicial enforcement of that Article. Rather, it merely asks that the judicial branch of the United States government refrain from violation of that guarantee, which was best defined in *In Re Duncan,* 139 U.S. 449 (1891). In *Duncan,* this Court stated that the distinguishing feature of a republican form of government is the right of the people to choose their own officers for governmental administration, and pass their own laws by virtue of the legislative power reposed in representative bodies.

In this action the District Court permitted Congress to disrupt state governmental functions by its actions. The people of Indiana have settled the very questions raised by the Department of Labor by the actions of their elected representatives and officers.

In *South Carolina v. United States*, 199 U.S. 437, 454 (1905), this Court stated:

> "Each state is subject only to the limitation prescribed by the Constitution and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that the United States shall guarantee to every state in this Union a republican form of government. Article 4, Section 4. That expresses the full limit of National Control over the internal affairs of a state."

Here, Congress has drastically exceeded the "full limit of National Control over the internal affairs" of Indiana by attempting to control the function of the State to provide for the care and education of its physically handicapped children and the care of its mentally ill citizens by requiring certain fiscal and administrative changes in Indiana's internal policies. Such action goes to the very heart of the federal system and must be prohibited by this Court as a violation of the Guaranty Clause.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review and reverse the judgment and order of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 74-1707

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

STATE OF INDIANA,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division —
No. IP 71 C 48
James E. Noland, *Judge*

No. 74-1708

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

STATE OF INDIANA,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division —
No. IP 71 C 49
S. Hugh Dillin, *Judge*

Heard February 20, 1975 — Decided June 18, 1975

Before SWYGERT and SPRECHER, *Circuit Judges,* and JAMESON, *Senior District Judge.*[1]

SWYGERT, *Circuit Judge.* These consolidated appeals raise the question of whether certain institutions operated by the State of Indiana are subject to the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*

The Attorney General of Indiana admits in both cases that the state institutions did not pay the statutory overtime premium or maintain records as required by the Act. He argues, however, that these institutions are not covered by the Act because there is not the requisite connection to interstate commerce.

Appeal No. 74-1707 concerns two state operated institutions, the Indiana School for the Blind and the Indiana School for the Deaf. It was stipulated by the parties that a substantial number of the employees of these institutions "use or otherwise handle goods that were produced, manufactured, or have otherwise originated outside of the State of Indiana." The "goods" include food, canned goods, books, and furniture. The employees also regularly engage in placing and receiving out-of-state telephone calls, preparing and mailing letters and materials to points outside of Indiana, receiving interstate shipments and unloading them, and preparing and mailing transcripts and documents for students and faculty to points outside Indiana. The district court found that the employees of the schools were "engaged in commerce," were engaged "in the production of goods for commerce," and handled "goods that have been moved in or produced for commerce" so that the schools were enterprises engaged in commerce subject to the Act.

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1 The Honorable William J. Jameson of the United States District Court for the District of Montana is sitting by designation.

Appeal No. 74-1708 concerns twelve mental hospitals and two other similar institutions operated by the State of Indiana. Defendant admitted "that a substantial portion of the goods which the defendant uses in the operation of [the hospitals] are received from points outside the State of Indiana . . ." The district court determined from this that the hospitals' employees must "handle or otherwise work on goods that have moved in commerce" and that the hospitals are therefore subject to the provisions of the Act.

I

The state has raised constitutional objections that must be disposed of initially. It argues that this suit is barred by the sovereign immunity provision embodied in the Eleventh Amendment. The contention is without merit. A suit brought by the Secretary of Labor to enforce the Fair Labor Standards Act is a suit by the United States. *See Mitchell v. McCarty,* 239 F.2d 721, 724 (7th Cir. 1957). The Eleventh Amendment does not apply to suits brought by the United States. *United States v. Mississippi,* 380 U.S. 128 (1965). The authority of the Secretary to bring this type of suit against a state was explicitly recognized in *Employees v. Mississippi Public Health Dep't,* 411 U.S. 279, 285 (1973).

The state also contends that this suit is barred by the Tenth Amendment because it interferes with powers reserved to the states. This argument has, in effect, already been rejected by the Supreme Court in *Maryland v. Wirtz,* 392 U.S. 183, 193-97 (1968). We find no basis for distinc-

tion in the fact that the case sought broad declaratory relief.[2]

II

We proceed to the main issue in these cases: whether these institutions are covered enterprises within the meaning of section 3(s)(4), 29 U.S.C. § 203(s)(4), as that section stood before May 1, 1974. Section 203(s)(4), as applicable to these appeals, reads as follows:

> (s) "Enterprise engaged in commerce or the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> • • •
>
> (4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit);

There is no dispute that these institutions are engaged in one of these enumerated operations. Nor is there a contention that the employees of these institutions do not handle various items that "have been moved in or produced for commerce." The state claims, however, that these items

2 The rationale of *Maryland v. Wirtz* would also answer the defendant's claim based on the Guaranty Clause, U.S. Const. art. IV, § 4, assuming that this claim is even judicially cognizable.

cannot be deemed "goods" as that term is used in the statute because the definition of goods in section 203(i) excludes "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." The question is whether these schools and hospitals are the ultimate consumers of these items.

One important point is that the supplies and food used for or given to the students and patients are not paid for by these recipients. On this basis it might be possible to distinguish *Brennan v. Dillion,* 483 F.2d 1334 (10th Cir. 1973), which held that an apartment house owner was not the ultimate consumer of paints, cleaning materials, and light bulbs used by his employees in the course of their maintenance duties. It could be argued that, unlike our cases, the tenants in *Dillon* were the ultimate consumers of these items because they indirectly purchased them as a part of their rent payments. We do not find this a proper basis for distinction. The rationale for *Dillion* is that the supplies "are for the use and benefit of the tenants." 483 F.2d at 1336. The items handled by the employees in our cases are for "the use and benefit" of the students and patients. They are a necessary part of the business of running a school or hospital. The fact that the students and patients might not pay for these items even indirectly is irrelevant. The Act uses the word "consumer" rather than the word "purchaser."

In an analogous case, the Eighth Circuit has reached the same conclusion in regard to articles such as medication or cleaning supplies used in state institutions. *Brennan v. State of Iowa,* 494 F.2d 100 (8th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3645 (U.S., June 9, 1975).

Support for the conclusion we reach can also be found in the legislative history of the 1974 amendment of section

3(s) although that amendment is inapplicable here. The Act was changed to add the words "or materials" after the word "goods" in order to clarify what was thought to be the original "intent to include within this additional basis of coverage the handling of goods consumed in the employer's business, as, *e.g.*, the soap used by a laundry," S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 17.

We hold that these institutions are not the ultimate consumers of the items in question. We also hold that their employees do handle or otherwise work on "goods"[3] within the meaning of the Act.

The judgments of the district courts in both cases are affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

3 Having determined that these employees do handle "goods" within the statutory meaning of that term we need not discuss the alternative alleged jurisdictional basis in No. 74-1707.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,	)	
v.	)	Civil Action No. IP 71-C-48
STATE OF INDIANA,	)	

MEMORANDUM OPINION

This cause is before the Court upon stipulated facts for a determination of certain questions submitted to the Court under a joint stipulation of the parties.

This action has been brought by the Secretary of Labor, pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, against the State for alleged violation of record keeping and overtime pay provisions of the Act. Specifically, the Secretary has charged that the State has not complied with the Act in its operation of the Indiana School for the Blind and the Indiana School for the Deaf.

The specific issues to be decided at this juncture of the case are whether the Secretary is barred from seeking relief under Section 17 of the Act [29 U.S.C. § 217] due to the Eleventh Amendment, whether the suit is barred by the Tenth Amendment, and, whether the two schools constitute an enterprise engaged in commerce or in the production of goods for commerce as defined in Section 3(s)(4) of the Act [29 U.S.C. § 203 (s) (4)] [hereinafter referred to as the "coverage" issue].

The State, through the State Health Commission, exercises administrative control over both the Blind School and the Deaf School. Both schools were created by the Indiana General Assembly for the principal purpose of

educating physically handicapped children. *See Ind. Code* §§ 16-7-6.5-1 *et seq.*, and 16-7-13-1 *et seq.*, (1971).

The Superintendent of each institution is appointed by the State Health Commissioner, subject to the Governor's approval, and most of the employees of the schools are employed under merit statutes and are subject ot the State Personnel Act. *Ind. Code* § 4-15-2-1 *et seq.*, (1971).

Both schools are funded from the State Treasury and by funds allocated from the United States Treasury under certain statutes such as Title I of the Elementary and Secondary Education Act, 20 U.S.C.A. § 241a. The schools also receive funds from private sources through grants and from the sale of meals, project materials and used kitchen grease as well as through commissions on coin telephones and room rentals. Meals are sold to visitors and also to some teachers and counselors. Live-in employees are charged for their laundry service and their room.

At both schools there are numerous job classifications and a substantial number of the employees use or handle goods which were produced, manufactured or otherwise originated outside the State. These employees regularly engage in placing and receiving out-of-state telephone calls, preparing and mailing letters and materials to points in and outside of Indiana, receiving letters and materials originating outside Indiana, paying for purchases made outside of Indiana, receiving interstate shipments at the institutions' warehouses and unloading them, and preparing and mailing transcripts and documents for students and faculty to points outside of Indiana.

In addition, the schools receive and sort mail for distribution within the schools, place purchase orders for goods through the state's central purchasing agency, and, at the Deaf School, employees prepare, print, bind and mail text-

books and other materials to points both inside and outside the State.

Further, members of the faculty and staff travel outside of the State in their official capacity and a great amount of the schools' equipment was produced outside of the State of Indiana. The parties have stipulated that, aside from the above, the schools do not otherwise manufacture goods for sale in interstate commerce nor ship goods in interstate commerce.

JURISDICTION

The defendant has contended that this suit is barred by the Eleventh Amendment. That Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. Amend. XI.

The State is, in essence, arguing that the Secretary cannot bring the suit to correct the alleged violation because the employees themselves could not do so under this Amendment.

The Supreme Court recently rejected this argument in *Employees of the Department of Public Health & Welfare v. Missouri,* 93 S.Ct. 1614 (1973). There, the Court held that the Eleventh Amendment may prohibit an individual from maintaining the suit under 29 U.S.C. § 216(b). However, the Court specifically stated that the Secretary, under 29 U.S.C. §§ 216(c) and 217 had the authority to bring the suit because suits against the states by the United States are not barred by the Amendment. *Id.* at 1618-19; *United States v. Mississippi,* 380 U.S. 128 (1964). Conse-

quently, the present suit is not barred by the Eleventh Amendment because a suit by the Secretary is one by the United States. *Mitchell v. McCarty,* 239 F.2d 721 (7th Cir. 1957).

The State also argues that to compel it to comply with the wage and hour provisions of the statute in question violates the Tenth Amendment, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively and to the people." U.S. Const. Amend. X.

The State argues that by running the two institutions in question, it is exercising education and fiscal power not delegated to the United States. Further, the State contends that to find coverage here would be disruptive to the balance of state-federal power.

The argument posited by the State was rejected by the Supreme Court in *Maryland v. Wirtz,* 392 U.S. 183 (1968) where the Court said:

> "[the state contends that the] Act may not be constitutionally applied to state-operated institutions because that power [the commerce clause] must yield to state sovereignity in the performance of governmental functions. This argument simply is not tenable." *Id.* at 195. *See Hodgson v. Board of Education,* 344 F. Supp. 79 (D.N.J. 1972).

This was held to be true because it is clear that where the federal government is acting within its delegated power any "countervailing state interest whether these be described as 'governmental' or 'proprietary' in character" are overridden. *Wirtz, supra,* at 195. *Cf. United States v. Dawson,* 467 F.2d 668 (8th Cir. 1972), *United States v. Garrison,* 348 F. Supp. 1112 (E.D. La. 1972).

Therefore, the present suit is not barred by the Tenth Amendment.

COVERAGE

The Secretary has alleged that the State has violated the overtime provisions of the Act and the record keeping provisions as well. 29 U.S.C. §§ 207(a)(2) and 211(c). As the litigation is currently concerned only with the issue of whether the State is subject to the Act, the only relevant statutory provisions to consider are 29 U.S.C. § 207(a)(2) and 29 U.S.C. § 203(r) and (s)(4).

Section 207(a)(2) provides:

> "No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 . . ."

for periods longer than set out by the subsection unless such employee be paid at a rate of one and one-half times his regular rate for the excess hours.

29 U.S.C. § 203(r) provides, in pertinent parts, as follows:

> " 'Enterprise' means the related activities performed . . . by any person or persons for a common business purpose, . . . For purposes of this subsection, the activities performed by any person or persons—
>
> (1) in connection with . . ., a school for mentally or physically handicapped or gifted children . . . (regardless of whether or not such . . . school is public or private or operated for profit or not for profit)
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shall be deemed to be activities performed for a business purpose."

Section 203(s)(4) provides, in pertinent part, as follows:

> " 'Enterprise engaged in commerce or the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, on [sic.] which—
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> • • •
>
> (4) is engaged in the operation of a . . . school for mentally or physically handicapped or gifted children . . . (regardless of whether or not such . . . school is public or private or operated for profit or not for profit)."

Both of these subsections were amended in their present form by the 1966 amendments.

The State has initially challenged that there can be no coverage under these statutes because the operation of two distinct types of schools by the State does not constitute an industry as contemplated by 29 U.S.C. § 202, the congressional purpose and statement of policy portion of the Act.

The enactment of the Fair Labor Standards Act by the Congress represents a clear statement of public policy, and, as such, the statute must be broadly construed in favor of coverage. *Mitchell v. Lubin, McGaughy & Associates*, 358 U.S. 207 (1959). It has been so construed to apply to state operated institutions. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

In determining if coverage was intended, the Court looks not to the nature of the employer's business, as the State argues here, but to the character of the activities of the

employees. *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207 (1959); *Shultz v. Blaustein Industries, Inc.*, 321 F. Supp. 998, 1007 (D. Md. 1971); *Wirtz v. Indiana Cablevision, Inc.*, 270 F. Supp. 973, 977 (S.D. Ind. 1967).

The facts presented herein, as well as the obvious policy enunciated by 1966 amendments, clearly indicates that if the other necessary elements for coverage are met, the operation by the State of the schools in question does constitute an enterprise and industry within the meaning of the statute. *See Maryland v. Wirtz*, 392 U.S. 183, 197-99 (1968).

In order to be covered by the Act, the enterprise in question must be engaged in commerce or in the production of goods for commerce. This is defined by the statute, 29 U.S.C. § 203(s), as meaning an enterprise which has employees engaged in commerce or the production of goods for commerce which includes employees handling or otherwise working on goods that have been moved in or produced for commerce by any other person. Whether an employee falls under this statute is a question which must be resolved on the facts of each case. *Shultz v. Ponsetto*, 308 F. Supp. (D. Pa. 1970).

The meaning of "engage in commerce" hinges on the definition of commerce itself. One is engaged in commerce if his activities are directly and vitally related to a function of an instrumentality or facility of interstate commerce so as to be, in a practical sense, part of it as opposed to isolated local activity. *Mitchell v. C. W. Vollmer & Co. Inc.*, 349 U.S. 427 (1955); *Wirtz v. Wohl Shoe Co.*, 382 F.2d 848 (5th Cir. 1967); *Wirtz v. First State Abstract & Insurance Co.*, 362 F.2d 83 (8th Cir. 1966); *Beneficial Finance Co. of Wisconsin v. Wirtz*, 346 F.2d 340 (7th Cir. 1965). Thus commerce, for the purposes of this Act, is not a technical concept but a practical one, *Galbreath v.*

Gulf Oil Corp., 294 F. Supp. 817 (D. Ga. 1968), and includes trade, transportation, transmission, or communication between states or a state and a place outside thereof. *Wirtz v. B. B. Saxon Co.*, 365 F.2d 457 (5th Cir. 1966).

In *Hodgson v. Montana State Board of Education*, 336 F.Supp. 524 (D. Mont. 1972), employees of a state board of education who were housekeepers, and custodians with the job of sweeping, mopping, scrubbing and washing classrooms, offices and dormitories were held to be employees engaged in commerce. In *Wirtz v. Dunmire*, 239 F. Supp. 374 (W.D. La. 1965), the Court found that when an employee spent three hours per week unloading interstate shipments, that was sufficient to constitute "engaged in commerce" and to require coverage. Similarly, the use of the mail has been held to be commerce, *North American Co. v. S.E.C.*, 327 U.S. 686 (1946), as is traveling across state boundaries. *Durkin v. Joyce Agency, Inc.*, 110 F. Supp. 918 (N.D. Ill. 1953) *aff'd per curiam, Mitchell v. Joyce Agency, Inc.*, 348 U.S. 945 (1955).

It seems clear that under the facts of this case the State has engaged in commerce in the operation of the two schools in question. The preparation and mailing of letters, documents, books and checks by the employees for the schools' benefit are commerce. In addition, the placing of interstate phone calls; the unloading of interstate shipments, and travel by school personnel outside of the State all constitute engaging in commerce within the meaning of the Act.

Further, the facts indicate that the employees do produce goods for commerce and do handle or work on goods moved in or produced for interstate commerce. "Goods," as defined by the Act, 29 U.S.C. § 203(i), include the subjects of commerce such as letters, telegrams, checks, books and other documents. *See Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490 (1945); *Durkin v. Joyce Agency*, 110 F. Supp. 918 (N.D. Ill. 1953). Those who have unloaded interstate shipments and who have had any contact with goods produced outside of Indiana have handled or worked on goods in commerce. *See Beneficial Finance Co. of Wisconsin v. Wirtz*, 346 F.2d 340 (7th Cir. 1965); *Furtell v. Columbia Club, Inc.*, 338 F. Supp. 566 (S.D. Ind. 1971). Therefore, it appears that coverage arises under this branch of § 203(r) as well.

The State also argues that, at least as to the production and handling of goods test, coverage cannot be found because it is the ultimate consumer of the goods it acquires. In fact the schools do not consume all of the products which they purchase. Further, the question of ultimate consumer is immaterial to the determination of whether the State is an enterprise engaged in commerce and is not controlling. *Shultz v. Kip's Big Boy, Inc.*, 431 F.2d 530 (5th Cir. 1970). Therefore, because the two institutions are engaged in commerce. they are covered by the provisions of 29 U.S.C. § 201 *et seq.*

Therefore, the Court concludes that this action is not barred by the tenth or eleventh amendment to the Constitution and that the stipulated facts show that there is coverage under the statute as to the two state operated schools in question. The stipulation of facts entered into by the parties does not contain any factual information pertaining to the issues of violation of record keeping provisions or failure to pay for the overtime hours worked. These issues have been reserved, by agreement of the parties, for presentation and a decision after the issues of coverage and jurisdiction were determined. A date for trial of those issues will be provided to the parties in due course.

DATED this 22nd day of May, 1974.

/s/ JAMES E. NOLAND

James E. Noland, *U.S. District Judge*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,
Plaintiff,
v.
STATE OF INDIANA,
Defendant.
No. IP 71-C-49

ENTRY

This cause comes before the Court on the motion of the plaintiff, Secretary of Labor, for partial summary judgment on the issue of the liability of the State of Indiana for alleged violations of the overtime and recordkeeping provisions of the Fair Labor Standards Act (hereinafter "Act"), 29 U.S.C. §§ 201 *et seq.* The Court has jurisdiction of the action pursuant to 29 U.S.C. § 217. Since the institution of this action a new Secretary has been appointed, and the Court hereby substitutes his name for that of the original plaintiff.

On January 27, 1971, the Secretary of Labor instituted this action seeking to enjoin the State of Indiana from violating the overtime and recordkeeping provisions of the Act and seeking to restrain the withholding of payment of overtime compensation to employees of the Muscatatuck State Hospital and other similar institutions which are listed as follows:

Evansville Psychiatric Children's Center
Central State Hospital
Evansville State Hospital
Madison State Hospital
Logansport State Hospital
Richmond State Hospital
Norman Beatty Memorial Hospital

Larue Carter Memorial Hospital
New Castle State Hospital
Fort Wayne State Hospital and Training Center
Northern Indiana Children's Home
Indiana State Soldiers' Home
Southern Indiana Tuberculosis Hospital

Several facts concerning the operation of the institutions are not in dispute. The defendant operates the above mentioned hospitals through its Mental Health Commissioner. By operating these hospitals the State is engaged in related activities, through unified operation or common control for a common business purpose, and is an "enterprise" within the meaning of 29 U.S.C. § 203(r). At the fourteen hospitals the defendant employs approximately 8,600 workers who have been compensated on a straight time rate for hours of work exceeding 42 hours a week during the period from November 1, 1968, to February 1, 1969, and for hours of work exceeding 40 hours a week since February 1, 1969. The defendant has not made, kept and preserved adequate records of its employees' daily and weekly hours of employment as prescribed by the regulations issued pursuant to the Act and published at 29 C.F.R. § 516.

There are three issues presented by the motion. First, the defendant contends that a three-Judge panel is required because statutes of the State of Indiana are sought to be declared unconstitutional. However, as is obvious from the complaint, the object of the action is to conform the policies of the State of Indiana in operating the hospitals to an act of Congress. In such an action a three-Judge panel is not required to be convoked. *Swift & Company v. Wickham,* 382 U.S. 111, 15 L.Ed.2d 194, 86 S.Ct. 258 (1965).

Secondly, the defendant contends that it is immune from this action by virtue of the Eleventh Amendment. But, the Supreme Court has held to the contrary. In *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973), the Court held that Section 16(c) of the Act gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation and said, "[s]uits by the United States against a state are not barred by the Constitution." 36 L.Ed.2d at 257. Since this is a suit by the United States against the State of Indiana, the immunity issued is resolved against the defendant. *Brennan v. State of Iowa,* 494 F.2d 100 (8 Cir. 1974). The suit by the Secretary on behalf of the employees of the named institutions is clearly permitted.

The third issue is whether or not the hospitals are "engaged in commerce or in the production of goods for commerce" within the meaning of Section 3(s)(4) of the Act. The Court notes that in a very similar action involving the identical parties the issue was resolved in favor of the plaintiff. See Memorandum Opinion, *Brennan v. State of Indiana,* No. IP 71-C-48, S.D.Ind., May 22, 1974. The Supreme Court held in *Maryland v. Wirtz,* 392 U.S. 183, 20 L.Ed.2d 1020, 88 S.Ct. 2017 (1968), that:

> "In order to be covered by the Act, an employer hospital must in fact have 'employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved or produced for commerce by any person . . .' "

The defendant originally admitted to being covered by the engaged-in-commerce provision (defendant's answer to Interrogatory No. 3) but later supplemented its response to deny that it is so engaged (defendant's supplemental

response to interrogatories). However, the defendant's answer to Interrogatory No. 5 provides in part, ". . . defendant will admit that a substantial portion of the goods which the defendant uses in the operation of [the hospitals] are received from points outside the State of Indiana . . ." Obviously, if the defendant uses goods received from points outside the State of Indiana it has employees who handle or otherwise work on goods that have been moved in commerce. Since it is the patients and not the institution which is the ultimate consumer of the goods, the State cannot argue that it is exempt from the Act's coverage pursuant to 29 U.S.C. § 203(i). *Brennan v. State of Iowa, supra.,* and cases cited therein.

Furthermore, the affidavit of Richard C. Kage attached to the defendant's brief opposing the motion for summary judgment affirmatively establishes in at least one institution that the defendant maintains a canteen facility at which employees sell goods to other employees, patients and visitors of the institution. The only inference which can be drawn from such facts is that the defendant has employees who are engaged in commerce or who handle goods moved in commerce, and that the defendant State of Indiana comes precisely within the language of the Act providing for the payment of overtime compensation and recordkeeping concerning the operation of the above named institutions.

Thus, there can be said to be no genuine issue of material fact in this action and summary judgment is hereby ordered for the plaintiff. The defendant, its officials, officers, agents, servants, employees, and those in active concert or participation with them are hereby permanently enjoined in the operation of the above named institutions from violating the provisions of the Fair Labor Standards Act of 1938, as amended. 29 U.S.C. §§ 201 *et seq.* The

Secretary and the State of Indiana are further ordered to determine the amount of compensation recoverable by the Secretary in this action.

Dated this 14th day of June, 1974.

/s/ S. HUGH DILLIN

S. Hugh Dillin, *Judge*

Copies to:

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No. 75-404

In the Supreme Court of the United States

OCTOBER TERM, 1975

STATE OF INDIANA, PETITIONER

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of a decision affirming two district court judgments in which petitioner was held to have violated the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*

The violations were found to have occurred in the operation of two schools and fourteen hospitals. It is not disputed that in each of the institutions employ-

ees handle supplies, material, and equipment that have been moved into Indiana from sources outside the state (Pet. App. A2-A3, A8-A9, A19).[1]

Petitioner contends that the application of the Act to state schools and hospitals is unconstitutional, both under the Tenth Amendment and under Article IV, Section 4, of the Constitution (Pet. 10, 23). It also contends (Pet. 14) that the institutions are not, in any event, enterprises engaged in commerce within the meaning of Section 3(s)(4) of the Act, 29 U.S.C. 203(s)(4).[2]

These contentions do not present issues warranting review by this Court. The constitutional questions

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[1] In the schools case, it was stipulated also that employees regularly receive and unload interstate shipments of materials and supplies, place and receive interstate telephone calls, and prepare and mail letters, materials, and transcripts for transmission to points outside the state (Pet. App. A8-A9). The district court treated these facts as an additional basis of coverage (Pet. App. A14, A15), but the court of appeals rested its decision solely on the handling of goods of out-of-state origin (Pet. App. A6).

[2] At the time in question, Section 3(s) provided:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person * * *.

In 1974, the first paragraph was amended by P.L. 93-259, 88 Stat. 55, 59, which substituted "or employees handling" for "including employees handling" and inserted "or materials" after "working on goods."

are answered by prior decisions of this Court. The statutory question was decided correctly below and has in any event been disposed of by supervening amendment of the Act.

1. The contention that the Tenth Amendment prohibits application of the Act to the state institutions is answered by *Maryland* v. *Wirtz*, 392 U.S. 183, in which the Court held that the Tenth Amendment did not bar the 1966 extension of the Act's coverage to schools and hospitals operated by states. The more recent extension of coverage to state and local government activities in general is now under consideration by the Court in *National League of Cities* v. *Dunlop*, Nos. 74-878 and 74-879. But *Maryland* v. *Wirtz*, which controls the present case, was only recently reaffirmed in *Fry* v. *United States*, 421 U.S. 542, after argument was heard in *National League*.

2. The guarantee of a republican form of government in Article IV, Section 4 of the Constitution has no application to the statutory provisions involved here, which in no way affect the states' form of government but merely extend to the states the minimum standards of compensation generally applicable to employers operating schools and hospitals. Moreover, this Court has consistently held that questions arising under Article IV, Section 4, are political in character and therefore not justiciable. *Luther* v. *Borden*, 7 How. 1; *Georgia* v. *Stanton*, 6 Wall. 50; *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569; and see *Baker* v. *Carr*, 369 U.S. 186, 224-225, 227.

3. Petitioner contends that the Act is inapplicable

because the state institutions, rather than their patients and students, are the "ultimate consumers" of the food, medications, paper, printed material, equipment, and other supplies used in the services provided. Accordingly, petitioner argues, those commodities cease to be "goods" within the definition of Section 3(i) when they come into the physical possession of the institutions,[3] and it therefore follows that the courts below were in error in holding that the institutions have employees "handling * * * goods that have been moved in * * * [interstate] commerce * * *," within the meaning of Section 3(s)(4).

In rejecting this reasoning, the decisions below are in accord with *Brennan* v. *State of Iowa*, 494 F.2d 100 (C.A. 8), certiorari denied *sub nom. Iowa* v. *Dunlop*, 421 U.S. 1015, and *Brennan* v. *Dillion*, 483 F.2d 1334 (C.A. 10), both of which held that the "ultimate consumer" of the materials handled in the employer's operations was not the employer itself, but the students and patients of the schools and hospitals (in the *Iowa* case) and the tenants of the apartment house (in the *Dillion* case) for whose "use and benefit" the materials were handled (see 494 F. 2d at 104; 483 F.2d at 1337). See also *Glick* v.

[3] Section 3(i) provides:

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part of ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

State of Montana, 157 Mont. 204, 213, 485 P.2d 42, 47. While the Fifth Circuit has expressed disagreement with *Dillion* insofar as the decision concerned supplies and materials that were never directly handled by the beneficiaries of the services (in that case, gasoline and oil products used by a trash removal company), that court stated that "[a] different problem was presented in *Brennan* v. *State of Indiana*" (the instant case), where the employees of "state-run schools and hospitals * * * handled food and supplies used but not paid for by students and patients * * *." *Dunlop* v. *Industrial America Corporation*, 516 F.2d 498, 499, n. 4.

No purpose plausibly attributable to Congress has been suggested for exempting employers when the supplies from outside the state are used in the operation of the business itself. The reason for the "ultimate consumer" exception in the 1938 definition of "goods" in Section 3(i) was the need to protect retail purchasers from the provisions of Section 15(a)(1), 29 U.S.C. 215(a)(1), which make it unlawful to transport "goods" produced in violation of the Act. *Brennan* v. *Dillion*, *supra*, 483 F.2d at 1337. The proviso in Section 3(s), enacted in 1961, which introduced the "handling" of goods from out-of-state sources as a new basis of coverage, was adopted in express recognition of "[t]he obvious economic fact that demand for a product causes its interstate movement quite as surely as does production" (107 Cong. Rec. 6236 (1961)). See H.R. Rep. No. 75, 87th Cong., 1st Sess. 3, 8 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 3-4 (1961); 107 Cong. Rec. 5841,

6234, 6240-6241 (1961). With the legislative purpose thus focused on interstate inflow caused by the demand for supplies, no reason appears why Congress should have intended that an employer who causes such inflow by his purchases should nevertheless be exempt if he later uses the supplies in his own operations.

In any event, whatever basis there may previously have been for arguing the point, it was removed by Section 6(a)(5)(E) of the Fair Labor Standards Amendments of 1974, P.L. 93-259, 88 Stat. 55, 60, under which all employees of a public agency are now deemed to be "engaged in commerce" within the meaning of Section 3(s). Under the amended statute, it is immaterial whether state employees handle "goods * * * that have been moved in * * * [interstate] commerce." Moreover, even as to private employment, it is no longer necessary to refer to the definition of "goods" in Section 3(i), with its reference to "ultimate consumers," because Section 6(a)(5)(A) of the 1974 amendments added the words "or materials" after "goods" in Section 3(s). 88 Stat. 59. The change was made for the express purpose of eliminating any doubt as to the correctness of *Dillion* by making "clear the Congressional intent to include within this [handling] basis of coverage the handling of goods consumed in the employer's business, as, *e.g.*, the soap used by a laundry." S. Rep. No. 93-690, 93d Cong., 2d Sess. 17 (1974). Thus the issue presented here arises out of superseded language and will not recur.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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